IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI,	)	

DEFENDANT'S MOTION TO STRIKE GOVERNMENT'S NOTICE OF INTENT TO SEEK A SENTENCE OF DEATH

Defense counsel, for reasons set forth in the accompanying memorandum, moves to strike the government's Notice of Intent to Seek a Sentence of Death ("Notice") to bar the government from seeking the death penalty, and in the event these requests are denied, to strike the first non-statutory aggravating factor from the Notice.

Respectfully submitted,
ZACARIAS MOUSSAOUI
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Defendant's Motion to Strike Government's Notice of Intent to Seek a Sentence of Death was served via facsimile and first class mail upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 25th day of April, 2002.

/S/
Frank W. Dunham, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
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UNITED STATES OF AMERICA	)	
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v.	)	Criminal No. 01-455-A
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ZACARIAS MOUSSAOUI,	)	

MEMORANDUM IN SUPPORT OF DEFENSE MOTION TO STRIKE GOVERNMENT'S NOTICE OF INTENT TO SEEK A SENTENCE OF DEATH

Defense Counsel requests that the Court strike the Notice of Intent to Seek a Sentence of Death ("Notice") and bar the government from seeking the death penalty. In addition, if that request is denied, counsel request that the Court strike the first non-statutory aggravating factor.

I. MOUSSAOUI IS NOT ELIGIBLE FOR THE DEATH PENALTY IN LIGHT OF THE LEGISLATIVE HISTORY AND THE PLAIN STATUTORY LANGUAGE OF THE FDPA

Moussaoui is charged with conspiring to violate six federal criminal statutes, four of which provide for a maximum penalty of death.[1] The government has filed a Notice seeking the death penalty pursuant to the Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591-98 (hereinafter "the FDPA"), which states in relevant part:

> A defendant who has been found guilty of—
>
> * * *
>
> (2) any . . . offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593—

[1] The offenses for which the death penalty are sought are conspiring to commit acts of terrorism transcending national boundaries in violation of 18 U.S.C. §§ 2332b(a)(2) & (c), conspiring to commit aircraft piracy in violation of 49 U.S.C. §§ 46502(a)(1)(A) & (a)(2)(B), conspiring to destroy aircraft in violation of 18 U.S.C. §§ 32(a)(7) and 34, and conspiring to use weapons of mass destruction in violation of 18 U.S.C. § 2332a(a).

* * *

> (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or
>
> (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act,
>
> shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

18 U.S.C. §§ 3591(a)(2)(C), (D). Under this statutory scheme, the death penalty is not available in this case.

The government's Notice seeks a sentence of death on each of the four death-eligible counts. In the Notice, the government alleges that Moussaoui is eligible for the death penalty because "he intentionally participated in an act" within the scope of 18 U.S.C. § 3591(a)(2)(C) and because he "intentionally and specifically engaged in an act of violence" within the meaning of 18 U.S.C. § 3591(a)(2)(D). The Notice does not specify the "act" or "acts" upon which it predicates these allegations. However, based upon discussions between counsel, it appears that the government intends to argue that his joining the alleged conspiracies charged in the indictment is both the qualifying "act" and the qualifying "act of violence" under these two subsections.[2] That being said,

[2] If this assumption as to the factual basis for the government's theory is incorrect, the government should set forth the facts upon which it does rely, or this Court should order it to do so. (continued...)

the fact is that none of the "acts" Moussaoui is alleged to have committed, as set forth in the indictment[3] or the Notice,[4] including joining the conspiracies alleged, can be said to have directly caused the death of any victims, as required by the statute.

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[2](...continued)
See United States v. Friend, 92 F. Supp. 2d 534, 535, 541 (E.D. Va. 2000) (noting that court had required government to provide factual basis for non-statutory aggravating factor to enable court to assess its constitutionality pretrial). Such a requirement is particularly necessary here, for, if this aggravating factor is not supported by a sound factual basis, Moussaoui is not death-eligible. Consequently, absent a pretrial determination of the appropriateness of this factor in light of the actual facts, Moussaoui would be forced to trial with a death-qualified jury, even though the government's theory of death eligibility was fatally flawed. *See Commonwealth v. Buck*, 709 A.2d 892, 896, 897 (Pa. 1998) (discussing state pretrial procedure and requirement that government act in good faith); *Smith v. State*, 568 So.2d 965, 968 (Fla. App. 1990). This would violate Moussaoui's due process rights.

[3] The indictment itself contains few allegations of other "acts" alleged to have been actually committed by Moussaoui among its 112 paragraphs. They include allegedly being present in 1998 at an Al Queda training camp (Overt Act, ¶ 14), contacting a flight school in September, 2000 (Overt Act, ¶ 34), receiving mail in October, 2000 (Overt Act, ¶ 35), flying from England to Pakistan in December, 2000 (Overt Act, ¶ 38), flying from Pakistan to England and then on to Oklahoma City in February, 2001 (Overt Acts, ¶¶ 43-44), opening a bank account in February, 2001 (Overt Act, ¶ 45), attending flight school in Norman, Oklahoma between February and May, 2000, during which time period he also joined a gym (Overt Acts, ¶¶ 46, 48), contacting a Florida flight school (Overt Act, ¶ 51), making inquiries about starting a crop dusting company (Overt Act, ¶ 53), purchasing flight deck videos for commercial aircraft (Overt Act, ¶ 56), paying for flight lessons (Overt Act, ¶ 60), making telephone calls to Germany (Overt Act, ¶ 65), receiving money orders (Overt Act, ¶ 67), purchasing two knives (Overt Act, ¶ 68), driving from Oklahoma to Minnesota (Overt Act, ¶ 70), taking flying lessons in Minnesota (Overt Act, ¶ 72), possessing various items (Overt Act, ¶ 73), and making allegedly false statements to federal agents on August 17, 2001, while detained (Overt Act, ¶ 74). There is no dispute that Moussaoui has been continuously in custody since August 16, 2001, nor is there any suggestion that, once detained, he had contact with anyone outside the jail prior to September 11.

[4] The only specific act that the Notice alleges is that Moussaoui "entered the United States where he then enjoyed the educational opportunities available in a free society, for the purpose of gaining specialized knowledge in flying an aircraft in order to kill as many American citizens as possible." Notice ¶ III.1. However, there is no allegation that he ever used that "specialized knowledge" or even that he ever obtained it, regardless of his alleged intent when he entered the country.

The conditions set out in § 3591(a) are threshold findings in the absence of which the death penalty may not be imposed. *See* David J. Novak, *Anatomy of a Federal Death Penalty Prosecution: A Primer for Prosecutors*, 50 S.C. L. Rev. 645, 655 & n.72 (1999), and cases cited therein. Based on the legislative history of the FDPA, basic rules of statutory construction, and the Eighth Amendment, merely joining any of the alleged conspiracies does not make Moussaoui eligible for the death penalty.

A. LEGISLATIVE HISTORY OF THE FDPA

When the FDPA was passed in 1994, Congress intended to establish procedures for imposing the death penalty in a manner that complied with the dictates of the Constitution. *See, e.g.*, "To Establish Constitutional Procedures for the Imposition of the Death Penalty," H.R. Rep. 103-467, 103d Cong., 2d Sess., 1994 WL 107578.[5] The House of Representatives, at least, recognized that the procedures adopted for imposition of the death penalty had to comply with the Supreme Court's decisions in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). H.R. Rep. 103-467, 1994 WL 107578 at "Background." The House also considered the procedures Congress already had enacted for imposing the death penalty when death results from the commission of air piracy and for certain drug-related murders. *See id.* The former had been enacted in 1974 and was then codified at 49 U.S.C. App. § 1473; the latter had been included in the Anti-Drug Abuse Act of 1988, and was codified at 21 U.S.C. § 848(e)-(r).

[5] *See also* Cong. Rec. S459 (1993) (comments by Senator Thurmond when introducing S. 49) ("The bill I am offering today comports with the constitutional requirements outlined by the Supreme Court and establishes procedures for the imposition of the death penalty for the numerous Federal crimes that currently authorize a sentence of death.").

In 1974, Congress, acting with *Furman* in mind, created the procedure for imposition of the death penalty for air piracy resulting in death. Legislative History of Public Law 93-366, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong.& Admin. News 3980-83. The death penalty was available when death "of another person result[ed] from the commission or attempted commission of the offense" of air piracy. 49 U.S.C. App. § 1472(n)(1) (West 1994)

The death penalty provisions subsequently included in the Anti-Drug Abuse Act of 1988 applied to "any person engag[ed] in or working in furtherance of a continuing criminal enterprise, or any person engag[ed] in [certain other drug-related] offense[s]" who "intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results." 21 U.S.C. § 848(e)(1). Section 848 also contained specific procedures applicable to death penalty trials under that statute.

The FDPA was a Congressional response to a call for an expanded death penalty, adopting procedures for imposition of the death penalty in relation to numerous other potential federal capital offenses for which the death penalty could not be imposed in light of *Furman*. See H.R. Rep. 103-467, 1994 WL 107578 at "Background"; *see also* Charles C. Boettcher, Comment, *Testing the Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591-98 (1994): United States v. Jones, 132 F.2d 232 (5th Cir. 1998)*, 29 Tex. Tech L. Rev. 1043, 1053-57 (1998). For the first time, the federal government broadly addressed the constitutional demands of *Furman* for all crimes punishable by death under federal law. The government also attempted to codify the Eighth Amendment culpability requirement set forth in *Tison v. Arizona*, 481 U.S. 137 (1987). *See* H.R. Rep. 103-466, 103d Cong., 2d Sess., 1994 WL 107577 at "Background."

B. STATUTORY LANGUAGE OF THE FDPA

In order to pass constitutional muster, a death penalty scheme must narrow the class of persons eligible for the death penalty and also must ensure that the ultimate decision is based on individualized inquiry. *See Jones v. United States*, 527 U.S. 373, 381 (1999); *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998).

In construing a statute, the courts must give operative effect to each word used. *See Duncan v. Walker*, 531 U.S. 991, 121 S. Ct. 2120, 2125 (2001); *Walters v. Metropolitan Educ. Enter.*, 519 U.S. 202, 209 (1997). The use of different words is presumed to be intentional and Congress is presumed to be conscious of what it is doing when it chooses between different available terms. *See Duncan*, 121 S. Ct. at 2125; *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994). Thus, both the word "offense" in one part of § 3591 and the word "act' in another part of the same statute must be given effect and § 3591 cannot be construed so as to render either word redundant. *See United States v. Alaska*, 521 U.S. 1, 59 (1997). The courts must assume that each word has meaning. *See Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 975 (4th Cir. 1993). Based on these standard principles of statutory construction, and in light of the history of federal death penalty sentencing statutes enacted since *Furman*, the mere joining of a conspiracy—even a conspiracy that contemplates causing the deaths of numerous victims—cannot be punished by a sentence of death under the FDPA. The FDPA, particularly when viewed in light of the more recent Supreme Court decisions, does not authorize the death penalty under these circumstances.

Consistent with the language in the underlying criminal statutes, § 3591 initially uses the word "offense" to identify criminal defendants who are potentially eligible for the death penalty. However, aside from a small number of cases not relevant here, *see* 18 U.S.C. § 3591(a)(1), the

death penalty is actually authorized only where, in addition to violating a statute carrying a possible sentence of death, the defendant's *own conduct* satisfies the narrowing criteria contained in § 3591(a)(2). First, a defendant may be eligible for death if he intentionally kills, or intentionally inflicts serious bodily injury that results in death. 18 U.S.C. §§ 3591(a)(2)(A), (B). Obviously, each of these bases of eligibility for the death penalty requires direct action by the defendant against the victim. In both of these situations, it is the actual conduct of the defendant that immediately causes the death of the victim. The government does not rely on these sections here.

A defendant may also be eligible for the death penalty even if he does not himself directly kill or inflict serious bodily injury. 18 U.S.C. § 3591(a)(2)(C), (D). These are the sections on which the government relies in its Notice. However, death eligibility under these subsections is not based merely on commission of or participation in an "offense," but on participation in an "act." Applying the rules of statutory construction discussed above, it is clear that a distinction must be drawn between the "offense" Moussaoui is alleged to have committed and the "acts" in which he is alleged to have participated. Moreover, although the offenses with which Moussaoui is charged carry a possible death sentence if the *offense* generally "*has resulted* in the death of any person," *see* 18 U.S.C. § 34 (emphasis added),[6] a defendant convicted of such an offense is actually eligible for the death penalty *only if* the death of the victim resulted *directly* from a specific *act* in which the defendant participated. Once again, a distinction must be drawn between the definition of the

[6] The other criminal statutes applicable here use the same critical language. *See* 18 U.S.C. § 2332a(a) (". . . if *death results*, shall be punished by death or by imprisonment for any term of years or for life"); 18 U.S.C. § 2332b(c)(1)(A) ("for a killing, or if *death results* to any person . . ., by death"); 49 U.S.C. § 46502(b)(1)(B) (". . . if the death of another individual *results* from the commission or attempt [to commit an 'offense'] . . . shall be put to death or imprisoned for life") (emphases added).

statutory penalty, and the definition of death eligibility. In short, to establish death eligibility the government must prove both a specific act and death as a *direct result* of that act. That the government can not do.[7]

Although the FDPA does not define the phrase "direct result," that language is far from being unique in the law. For example, in interpreting the punishment provisions applicable to conspiracies to deny constitutional rights under 18 U.S.C. § 241, which do not even contain a requirement of directness, the Second Circuit held that the phrase "if death results" embodied "the principle of *proximate cause.*" *United States v. Guillette*, 547 F.2d 743, 749 (2nd Cir. 1976) (emphasis added). Similarly, in the civil context, courts have held that "[a]n injury or damage is a direct result of an act or failure to act when that act or failure to act starts an event or chain of events which inevitably leads to the injury or damage." *Fowler v. Boise Cascade*, 948 F.2d 49, 53 (1st Cir. 1991); *see also Morrow v. Greyhound Lines*, 541 F.2d 713, 725 n.5 (8th Cir. 1976) (injury or damage is proximately caused by an act . . . [when] the act . . . played a substantial part in bringing about or actually causing the injury or damage; *and the injury or damage was a direct result of the act or omission and without which the injury or damage would not have resulted*") (emphasis added). Similarly, in the context of the federal sentencing guidelines, with or without the limitation of directness, the courts have interpreted "result" as requiring a demonstration of causation. *See United States v. Fox*, 999 F.2d. 483, 486 (10th Cir. 1993) (finding that causation established for purposes of U.S.S.G.

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[7] The significance of the language used in §§ 3591(a)(2)(C) and (D) in fathoming the intent of Congress is also supported by the fact that, in enacting the FDPA, Congress repealed the death penalty provisions applicable to the pre-existing air piracy statute that had been included in Title 49. *See* Pub. Law 103-322, § 60003(b), 108 Stat. 1970 (1994). As noted above, *supra* page 5, that statute had allowed for the death penalty if death "resulted" from the offense; it did not require proof of a specific act by the defendant that directly caused the death.

§ 1B1.3(a)(3), when harm was a "direct result" or "flowed naturally" from defendant's criminal misconduct); *United States v. Yeamon*, 194 F.3d 442, 457 (3rd Cir. 1999) ("Section 1B1.3(a)(3), [U.S.S.G.,] establishes a causation requirement when determining actual loss."); *United States v. Molina*, 106 F.3d 1118, 1123-24 (2nd Cir. 1997) (holding that causation is established for purposes of U.S.S.G. § 1B1.3(a)(3) when defendant "put into motion a chain of events that contained an inevitable tragic result" of relevant harm) (internal quotation marks and citation omitted).

C. APPLICATION TO THIS CASE

All of the offenses which Moussaoui is alleged to have committed are conspiracies. Treating the "act" of joining a conspiracy as an act for purposes of § 3591(a)(2), as the government would have this Court do, would be inconsistent with long-standing criminal conspiracy law. An overt *act* is "separate and distinct from the conspiracy itself." *United States v. Pomranz*, 43 F.3d 156, 160 (5th Cir. 1995); *see also Iannelli v. United States*, 420 U.S. 770, 777 (1975). It would, therefore, be improper to allow the government to rely on the allegation that Moussaoui joined the conspiracy as the "act" upon which his death eligibility is based. In addition, treating a generic description of the offense, joining a conspiracy, as an "act" for purposes of § 3591(a)(2)(D) would eliminate the "major participation" requirement for "minimum culpability" under the Eighth Amendment.

In *Tison v. Arizona*, 481 U.S. 137 (1987), the Supreme Court held "major participation in the felony committed combined with reckless indifference to human life is sufficient to satisfy the minimal culpability requirement." *Id.* at 158. Section 3591(a)(2)(D) requires a violent act by the defendant himself. If the words "joining a violent conspiracy" are substituted for "act" in § 3591(a)(2)(D), the result would be a statute providing for death eligibility for any defendant who " . . . engaged in [joining a violent conspiracy], knowing that the [joining of a violent conspiracy]

created a grave risk of death . . . such that participation constituted a reckless disregard for human life and the victim died as a direct result of the [joining of a violent conspiracy]."

Conspicuous by its absence in this re-writing of subsection (D) is any requirement that the defendant have "major participation" in the violent conspiracy, as the Eighth Amendment, *Tison* and subsection (D) all actually require. Thus, a person who played even a trivial role that "caused" nothing—but who intended that a grave risk of death would result from the overall conspiracy—would be death-eligible under this statute (so long as the conspiracy itself directly caused the death), but not under the Eighth Amendment. That cannot be the meaning of § 3591(a)(2)(D). Of course, under our reading of the statute, this problem disappears because in distinguishing "act" from a generic description of the offense, the statute then requires that the defendant actually do something himself as part of the offense conduct that is both violent and creates a grave risk of death—a requirement that "builds in" the "major participation" element of *Tison*, and ensures that it will be satisfied in every case that passes muster under this subsection.

Unlike § 3591(a)(2)(D), subsection (C) does not require a violent act by the defendant himself. This section was intended to cover the phone call from the kingpin or mobster to the contract killer, or from the terrorist commander to the operative, which phone call proximately causes the victim's death but is not itself a "violent" act. However, the word "act" cannot be given a different meaning in subsection (C) from that applied to subsection (D), *i.e.*, "act" cannot be read to mean "joining a violent conspiracy" in (C), but something different in (D), Congress presumably having intended the word "act" to mean the same thing in each subsection of the same statute.

If the underlying capital offenses are, as the indictment states, conspiring with others to commit certain unlawful acts, then joining the conspiracy adds nothing to the equation. Indeed, by

definition, every person who is guilty of a charge of conspiracy at some point had to join that conspiracy. Thus, under the government's presumed theory, every defendant found guilty of a conspiracy for which death is a possible sentence would meet the "participated in an act" criteria of §§ 3591(a)(2)(C) and (D). Such a construction would be inconsistent with Congress's clear statutory intent when it used the word "offense" in § 3591(a)(1), but the word "act" in §§ 3591(a)(2)(C) and (D). Thus, the *act* of joining a conspiracy plainly can not be the "act" upon which death eligibility is predicated.

In addition to this conceptual flaw in the government's theory, none of the acts Moussaoui is alleged to have committed, including the act of joining the conspiracy, regardless of the criminal intent of that conspiracy, can be said to have *directly caused* any deaths. There is certainly no suggestion that any of the conspiracies alleged in the indictment were adrift when Moussaoui allegedly joined, and then were set back upon course because of his alleged arrival on the scene. Nor is there any suggestion that, if he joined a plan to commit the September 11th attack specifically when Ramzi Bin al-Shibh was denied entry into the United States, as the government alleges,[8] he had any such effect on that conspiracy. Indeed, what is significant about the allegations in the indictment and Notice is both what is included—that the nineteen hijackers were in the United States and in contact with each other prior to Moussaoui's arrival in the country, that Moussaoui was in jail for an entire month prior to September 11, and that the hijackers successfully completed the hijackings without any assistance from him—and what is missing—any allegation that he ever had any contact, direct or indirect, with any of the supposed nineteen hijackers, much less after it is suggested that he joined the September 11th conspiracy after Bin al-Shibh was denied entry into the

[8] See Indictment, ¶¶ 28-32, 43.

United States.[9] Thus, it simply can not be said that Moussaoui's alleged joining of the conspiracies alleged in the indictment to commit the attacks of September 11th, *directly resulted* in that attack and the deaths of any victim of that attack.

Moreover, if the government intends to rely on some acts other than the joining of a conspiracy as the predicate for his death eligibility, the fact is that no other specific act which he is alleged to have committed or in which he allegedly participated contributed in any way to the September 11th attacks. There is no allegation that he ever used the money he brought into the country or allegedly received while he was here to facilitate the hijackings or that he committed any other act which actually contributed to the hijackings. For example, although it is alleged he bought a global positioning system (GPS), there is no suggestion it was used by the hijackers. Nor is it alleged that he passed on the knowledge gained from his flying lessons to the hijackers,[10] that his membership in a gym, or his purchase of two knives, helped the hijackers intimidate or overwhelm the crews of the hijacked planes while he was in jail, or that anything else he did presumably in preparation to participate in this or some other hijacking contributed in the least to the planning or success of the hijackings at issue in this case. When all is said and done, the government wants to execute someone so badly for the events of September 11 that, because no one else is available, it is willing to ignore the plain requirements of the law to make Moussaoui death-eligible not based on anything he actually did, but on what it insists he wanted to do.

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[9] It is counsel's understanding that not only is such conduct not alleged in the pleadings, but the government even now has no such evidence.

[10] In fact, he could not have even if he wanted to. As the Government well knows, Moussaoui was a terrible student pilot.

II. THE GOVERNMENT'S FIRST NON-STATUTORY AGGRAVATING FACTOR VIOLATES THE FIRST AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IS NOT CONSTITUTIONALLY RELEVANT

For its first non-statutory aggravating factor, the government alleges that:

> . . . Moussaoui, a French citizen entered the United States, where he then enjoyed the educational opportunities available in a free society, for the purpose of gaining specialized knowledge in flying an aircraft in order to kill as many American citizens as possible.

Unfortunately, in its overreaching effort with this aggravating factor to pander to a public or a jury which it would like to overheat by waving the flag, the government ignores the very constitutional principles embodied in that flag. In *Dawson v. Delaware*, 503 U.S. 159 (1992), the Supreme Court plainly held that it is a violation of a defendant's rights under the First Amendment to the United States Constitution for the state to seek the death penalty, even in part, on the political beliefs of the defendant, absent proof of a link between those beliefs and an element of the defendant's character relevant to the capital sentencing determination.[11] *See id.* at 164-67. This the first non-statutory aggravating factor completely fails to do.

Beyond the inexplicable but unavoidable implication that the United States is a "free society" whereas France is not, this factor is constitutionally deficient because it plainly seeks to make Moussaoui's citizenship and alleged lack of appreciation for, and exploitation of, American political values relevant to the death determination. It is not constitutionally relevant to that determination—*i.e.*, the decision as to who should live and who should die—that Moussaoui is a French citizen, nor that the United States is a "free society," nor that he took flying lessons here rather than in France or

[11] Delaware had introduced evidence of Dawson's membership in a racist organization, the Aryan Brotherhood.

elsewhere. *See United States v. Friend*, 92 F. Supp. 2d 534, 541 (E.D. Va. 2000) (an aggravating factor must be "focused on circumstances that are . . . 'particularly relevant to the sentencing decision,'" and "measured in perspective of the fundamental requirement of *heightened reliability* that is the keystone in making 'the determination that death is the appropriate punishment in a specific case'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 192 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Rather than following these centuries-old principles, the government attempts, with this aggravating factor, to invoke Moussaoui's French citizenship against him and to politicize the death penalty determination process. *See Zadvydas v. Davis*, 121 S. Ct. 2491, 2500-01 (2001) (alienage protected by Due Process Clause in immigration proceedings when alien is present in the United States); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (aliens entitled to protections of Fifth and Sixth Amendments) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). So, too, the protection of the Fourteenth Amendment applies to foreign nationals in the United States the same as citizens.[12] *See Yick Wo*, 118 U.S. at 369. Thus, it is clear that persons such as Moussaoui, when they are charged with crimes in the United States, are entitled to all the protections that the Constitution affords to citizens. The government's attempt to put him to death based upon his French citizenship and his entry into the United States as a foreign national is unconstitutional. Therefore, this factor must be stricken.

[12] Of course, the Fourteenth Amendment only applies to the states. However, when considered in connection with the other cited cases, *Yick Wo* demonstrates that all rights under the Amendments to the Constitution apply to non-citizens. Indeed, were the rule otherwise, the Eighth Amendment prohibition against cruel and unusual punishment might protect aliens facing death at the hands of the States, but not at the hands of the federal government.

CONCLUSION

For the foregoing reasons, this Court should strike the aggravating factors identified above and the Notice of Intent to Seek a Sentence of Death, and bar the government from seeking the death penalty in this case.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support of Defense Motion to Strike Government's Notice of Intent to Seek a Sentence of Death was served via facsimile and first class mail upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 25th day of April, 2002.

/S/
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